U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: March 8, 2000
Case No.: **1997 INA 028**

In the Matter of:

JUZER SAIFEE, Employer,

on behalf of

ANIS ZAHIR, Alien

Certifying Officer: R. M. Day, Region IX.
Appearance: Garish Sarin, Esq., of Los Angeles, California, for the Employer and Alien

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that JUZER SAIFEE ("Employer"), filed on behalf of ANIS ZAHIR ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested reconsideration and administrative judicial review.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the

[1] The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On January 17, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Cook/Domestic" for this household. The job was classified as "Cook" under DOT Occupational Code No. 305.281-010.[2] The job duties were described as follows:

> Plans menus with the family. Prepare and cooks meals according to habits and taste of employer who is Muslims from Pakistan. Requiring experience and knowledge with Indian/Pakistani food. Especially curries, Kabobs, breads using Halal meat and traditional, knowledge in spices and preparation. Serve meals, buys meats and vegetables. Must be non-smoker.

AF 55 , box 13. (Copied verbatim without change or correction.) The wage offered was $26,524 per year for a forty hour week, without provision for overtime. The hours were from 11:00 A.M. to 7:00 P.M. No educational requirement was stated, but the Employer specified two years of experience in the Job Offered or in the Related Occupation of Indian/Pakistani Cook/Chef. *Id*., box 14.[3]

Notice of Findings. The March 13, 1996, Notice of Findings ("NOF") denied certification subject to Employer's rebuttal. AF 46-53. The NOF said (1) the position did stated in the Application was not clearly shown to be a full-time job within the meaning of 20 CFR § 656.3. Although the Application said the Alien would be employed forty hours per week in cooking and in carrying out related food preparation duties, the Employer did not show that the job duties described constitute full-time employment in this household. The NOF then directed the Employer to provide further information and other evidence to rebut this finding. (2) Citing 20 CFR § 656.20(c)(4), the NOF said the Employer must be able to pay the amount of the offered salary. Since the Employer has no employer tax identification number because she has no employees, he was directed to document her ability to pay the wage offered, and was

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[2]305.281-010 **COOK** (domestic ser.) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.)*GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81.*

[3]A national of Pakistan, the Alien was living in the U. S. at the time of application, but did not indicate that she had visa authority to do so. Born 1941, the Alien did not indicate any education whatsoever. The Alien worked as a Domestic Cook from December 1986 to September 1991 in Pakistan. From April 1992 to the date of application the Alien was unemployed. AF 80-82.

instructed as to the nature and content of the evidence to file. (3) Citing 20 CFR § 656.21(b)(2)(i)(A), the NOF noted the requirement of "experience with Indian/Pakistani food, especially curries, Kabobs, breads using Halal meat and traditional," and observed that this job requirement was unduly restrictive and would preclude the referral of otherwise qualified U. S. workers. The Employer was instructed to amend the Application by deleting this provision and readvertising the position or, in the alternative, to show that the job qualification was not a restrictive requirement and was common to the occupation in the United States, or that it was a business necessity.

Rebuttal. On April 15, 1996, the Employer filed a Rebuttal which included a letter from counsel, a statement by the Employer, and portions of the Employer's federal income tax return for 1994. AF 35-45. The Employer described his household members, his own and his wife's business obligations, the details of the duties of the Domestic Cook, the time required to perform the work, and the reasons for the restrictive job requirements.

Final Determination. The CO denied certification in the Final Determination issued on May 30, 1996. AF 30-34. After reviewing the NOF and the rebuttal, the CO concluded that the Employer's rebuttal failed to sustain his burden of proof. The CO said the rebuttal did not identify the person who performed the domestic cook duties prior to the application. Consequently, the assertion of the amount of time required to perform the work each day was not credible. Addressing the capacity to pay the salary offered, the rebuttal established an "actual spendable income" that amounted to $58,063. Although the amount left after the deduction of the salary that the Employer proposed to pay the Alien was $31,439, the CO nevertheless accepted the Employer's ability to pay. On the other hand, the CO was not persuaded that the job duties described truly equalled eight hours a day.[4] For this reason the CO concluded that the Employer failed to establish that this was a position of full-time employment to which U. S. workers could be referred under 20 CFR § 656.20(c)(8).

The CO further concluded that the experience requirement was unduly restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A), explaining that cooking specialty ethnic cuisine was beyond the scope of the DOT occupation description for a domestic cook and failed to establish how difficult it would be to instruct a U. S. worker who was qualified as a domestic cook to prepare food to meet the tastes of the Employer's family. Consequently, the Employer failed to demonstrate the business necessity of skill in the preparation of the specified ethnic cuisine. The CO concluded by denying certification under the provisions of 20 CFR §§ 656.3, 656.20(c)(8), and 656.21(b)(2)(i)(A).

Appeal. On June 27, 1996, the Employer requested administrative judicial review of the denial of certification in the Final Determination.

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[4]Even though the rebuttal evidence indicated that one-half of the Employer's disposable annual income would be paid out as salary to the Domestic Cook, the CO found that Employer's income level to be sufficient. While the CO's conclusion as to the adequacy of Employer's income appears to be contrary to the evidence of record, it will not be discussed, in view of the remand order herein.

DISCUSSION

The issues that the NOF raised were (1) whether the duties of the Job Offered will keep the worker occupied throughout a substantial portion of the work day, and (2) whether a *bona fide* job opportunity actually existed in the Employer's household. These issues can be determined together.[5] The Board explained in **Daisy Schimoler**, 1997 INA 218 (Mar. 3, 1999)(*en banc*), however, that there is little relevance in whether the worker's duties require constant work for the entire workday, provided that the workday is customary for a full-time employee in the industry or under an employer's special circumstance. In the Board's further opinion in **Carlos Uy, III**, 1997 INA 304 (Mar. 3, 1999)(*en banc*), which it issued on the same day, BALCA held that a CO may reasonably ask for the same type of information in an analysis of the *bona fides* of a job opportunity under the totality of circumstances test pursuant to 20 CFR § 656.20(c)(8), and its holding in **Daisy Schimoler** did not affect the CO's authority to inquire about an employer's ability to offer permanent, full-time work.[6]

Although the NOF was issued March 13, 1996, the rebuttal was filed April 15, 1996, and the Final Determination was issued May 30, 1996, the holdings in **Carlos Uy, III**, and **Daisy Schimoler**, which now govern our deliberations, were unknown to either the Employer or the CO at any point during the pendency of this proceeding. Under the holding in **Carlos Uy, III**, the issue on which the evidence should have focused was not whether the job offered was full-time, but whether a *bona fide* job opportunity actually existed in the household of the Employer, based on the totality of circumstances. As this appeal was *sub judice* when the Board decided **Carlos Uy, III**, this matter must be remanded to permit the CO to issue a new NOF that will require rebuttal evidence based on the holding in **Carlos Uy, III**. Moreover, the Employer must be given the opportunity to include in his new rebuttal evidence that will address such issues as the new NOF will indicate to be germane to certification.

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[5]Controlling precedent places on the Employer the burden of proving that it is offering full-time employment. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988)(*en banc*). The CO's findings that the Employer did not sustain the burden of proof will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). Consequently, in all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification. Congress enacted § 212(A)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5)(a) of the Immigration Act of 1990 and recodified at 8 U.S. C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979). To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Pursuant to the favored treatment Congress legislated for the limited class of alien workers whose skills were needed in the U. S. labor market, 20 CFR § 656.2(b) assigned the burden of proof in an application for alien labor certification under this exception to the general exclusion of aliens under the Act. Because certification of alien workers is an exception to the general exclusion of immigrants, the Panel is required to construe its provisions strictly, and it must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen,** 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[6] *Cf., e.g.*, **Collectors International, Ltd.**, 89 INA 133 (Dec. 14, 1989).

Accordingly, the following order will enter.

ORDER

1. The Certifying Officer's decision denying certification under the Act and regulations is hereby vacated and this file is remanded for reconsideration for the reasons hereinabove set forth.

2. The Certifying Officer is directed to reexamine the record in the light of the Board's recent decisions in holdings in **Carlos Uy, III**, *supra,* and **Daisy Schimoler**, *supra,* and to issue a second Notice of Finding that will direct the filing and refiling of evidence that the position offered is *bona fide* within the meaning of 20 CFR § 656.20(c)(8) under the totality of circumstances test to the extent that the Certifying Officer finds such criteria applicable to the determination of this case.

3. The Certifying Officer is directed to reconsider the finding as to the sufficiency of the Employer's income to pay the salary offered in his application for alien labor certification.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.